U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 May 2003

Case No.: 2001-LHC-1438

OWCP No.: 5-109338

In the matter of

ARCHIE T. SPIERS, JR.,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM
Party in Interest.

Appearances:
Jennifer West Vincent, Esq., for Claimant
Jonathan H. Walker, Esq. for Employer
Ronald Gurka, Esq., for Director

Before:
DANIEL A. SARNO, JR., Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. §§ 901 *et seq*. Archie T. Spiers, Jr. ("Claimant") sought compensation for an injury sustained in the course of working for Newport News Shipbuilding & Dry Dock Co. ("Employer").

A formal hearing was held on January 14, 2003, at which time the parties notified the court that they had reached an agreement and would be presenting stipulations to the court post-hearing. Employer notified the court that there did still exist a contested § 8(f) issue. Therefore, Employer submitted exhibits EX 1 - EX 9 in support of the agreed stipulations, as well as the § 8(f) issue. The

exhibits were admitted without objection. The Director, Office of Workers' Compensation Programs ("Director") did not attend the hearing, nor submit any exhibits. The court set a briefing date of March 21, 2003 for the § 8(f) issue. Both Employer and the Director submitted timely post-hearing briefs.

On February 20, 2003, Claimant submitted stipulations signed by Claimant, Claimant's counsel, and Employer's counsel. The parties consented to the issuance of an order consistent with those stipulations.

In addition, Claimant's counsel submitted a Fee Affidavit and supporting documents. Counsel informed the court that the parties had reached an agreement concerning a fair and reasonable attorney's fee in the amount of $1,602.00 as payment in full of the fees and costs related to this matter.

The final remaining issue is whether Employer is entitled to relief under § 8(f) of the Act. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent.

STIPULATIONS

Claimant and Employer stipulated to, and the court finds, the following facts:

1. Claimant was employed by Employer as a draftsman from June 18, 1951, until September 7, 1951, and from June 14, 1954, until October 18, 1954. An Employer-Employee relationship existed between Claimant and Employer for all times pertinent to this claim.

2. Throughout his employment with Employer, Claimant performed work related to ship repair or ship construction aboard ships on the navigable waters of the James River or its adjacent piers and dry docks.

3. Employer is in the business of constructing and repairing ocean-going vessels.

4. Through many years of his employment with Employer, Claimant was exposed to airborne asbestos dust and fibers during the course of his employment.

5. On or about July 24, 1998, Claimant was diagnosed by Dr. Charles J. Donlan, with asbestos related lung disease, a permanent and potentially progressive lung disease, and that disease has permanently impaired his pulmonary function.

6. Claimant's asbestos related lung disease was caused, in part, by his exposure to airborne asbestos dust and fibers during and in the course of his aforesaid employment with Employer.

7. Upon receipt of the knowledge of the diagnosis of asbestosis, Claimant gave timely notice of his injury to Employer and filed a timely claim for benefits under the Act; Employer filed a timely controversion.

8. Claimant is permanently and partially disabled which partial disability was and is caused, in part, by the aforesaid occupational asbestos related lung disease, and such disability began on July 24, 1998.

9. On March 24, 1999, Claimant began seeing Dr. Albrecht M. Heyder, who made a diagnosis of asbestos related lung disease.

10. At the request of Employer, Claimant was examined by Dr. James O. Shaw on September 18, 2000. Dr. Shaw made a diagnosis of asbestos related lung disease.

11. Dr. Charles J. Donlan further provided that Claimant is suffering from a 50% permanent impairment. Dr. James O. Shaw further provided that Claimant was suffering from a 55% permanent impairment. Claimant and Employer stipulate and agree that the extent of Claimant's impairment is 53%, (an average of the two AMA ratings) consistent with the established range of pulmonary impairments specified by the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, for asbestosis. Therefore, Claimant and Employer agree and stipulate that in light of the progressive nature of asbestosis and in light of the uncertainty of the extent of impairment, Claimant's disability is, at present 53%.

12. Claimant retired from active continuing employment more than one year prior to his diagnosis of asbestosis. Claimant and Employer agree and stipulate that the average weekly wage of Claimant at the time of his diagnosis was $417.87, the National Average Weekly Wage. Therefore, Claimant is entitled to compensation for that permanent partial disability at the rate of $147.65 per week from July 24, 1998, through the present and continuing (2/3 x $417.87 x 53%).

13. Claimant is entitled to receive payment from Employer for all past, present, and future medical bills incurred for treatment, testing, and surveillance of his asbestosis, pursuant to § 7 of the Act. Claimant's authorized physician is Dr. Charles J. Donlan.

14. Claimant is entitled to and Employer will pay interest for unpaid compensation benefits, which amount shall be paid at the same time as, but in addition to, such past due compensation.

15. Employer agrees to fully implement the Longshore benefit entitlement and to file the appropriate LS-208 with the Office of Workers' Compensation Programs within fourteen (14) days of the signing of this document by Employer's representative. It is understood and agreed that this action will occur without regard to the existence or non-existence of (but subject to) a third-party credit on behalf of the Employer on

the date of the signing of this document and without the entry of an Order of Compensation by the United States Department of Labor.

16. Claimant has been required to utilize the services of attorney, Jennifer West Vincent, in the prosecution of this claim. Upon consideration of the nature and extent of the services rendered by counsel, the experience and expertise of counsel, the complexity of the legal and factual issues, and the benefits received by Claimant, the parties agree that a fee in them amount of $1,527.00 is fair and reasonable compensation for the services rendered by said attorney to Claimant and that reasonable costs of $75.00 have been incurred by and for Claimant in this matter while said matter was pending before the Office of Administrative Law Judges. Employer agrees to pay the amount of $1,602.00 for time spent before the Office of Administrative Law Judges, directly to Jennifer West Vincent, as payment for legal services rendered by said attorney and for reimbursement of said costs, in addition to and independent of the compensation payments to be made to Claimant.

DIRECTOR'S MOTION TO EXCLUDE EMPLOYER'S POST-HEARING EVIDENCE

On February 24, 2003, and again on March 6, 2003, Employer sent to the Office of the Regional Solicitor an additional exhibit upon which it intended to rely. Employer labeled this exhibit E-10.[1] Thereafter, on March 10, 2003, Director's Motion to Exclude Employer's Post-Hearing Evidence was filed. Employer submitted its response on March 21, 2003.

The standards governing the admissibility of evidence in administrative hearings are less stringent than those which govern under the Federal Rules of Civil Procedure. The ALJ is not bound by common law or statutory rules of evidence or technical or formal rules of procedure. 33 U.S.C. § 923; 20 C.F.R. § 702.339. Rather, the ALJ is directed to inquire into all matters at issue and receive evidence pertaining thereto. *See, e.g., Bachich v. Seeatrain Terminals of California*, 9 BRBS 184 (1978) (ALJ erred by refusing to accept medical reports relevant and material to the dispute at issue). Thus, the ALJ may re-open the record for the receipt of evidence as is deemed necessary in order to best ascertain the rights of the parties. *See Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982); *see also* 20 C.F.R. §§ 702.338, 702.339.

The Director contended that this evidence should be excluded because Employer "failed to offer any rationale justifying holding the record open beyond the formal hearing." Director's Br. at

[1]The court would like to note that it can only assume that the intention of Employer was to re-open the record in order to admit this additional medical evidence. Procedurally, Employer should have submitted the additional evidence to the court's attention, along with a motion requesting the record be re-opened to admit this supplemental evidence. *See Ross v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 224 (1984) (evidence must be formally admitted into the record; a decision issued based on evidence not formally admitted violates the APA). However, the Director was aware of Employer's intention, and the court did in fact become aware of the existence of the evidence, and Employer's desire to include it in the record. Therefore, while the court might remind Employer that a motion is the proper procedure to employ in the future, this evidence shall not be disregarded for failure to formally move the court to re-open the record and admit the evidence.

4. Employer responded that the report was submitted as soon as it was received, which was nearly a month before the brief due date. While it is certainly true that Employer had ample opportunity throughout this adjudication to complete its discovery, it cannot submit what does not exist. The document in question is a letter opinion, dated February 17, 2003. Thus, this was not an existing document which Employer simply failed to submit. The fact of the matter is, upon its creation and receipt, Employer proffered the document within a reasonable time. This constitutes a sufficient rationale justifying post-hearing admittance of the document.

Additionally, the Director argued that the post-hearing evidence should not be admitted, as it is not supported by medical findings or reasoning, and thus cannot be accorded any weight. However, this is an issue of credibility, not admissibility. The question before the court concerns the contribution of Claimant's pre-existing and work-related injuries to his ultimate disability. The medical opinion of Dr. Donlan is therefore relevant. Whether it is capable of supporting an award of § 8(f) relief is a matter better suited to the analysis section of this decision.

Moreover, as Employer noted, "the Director is in no way prejudiced by this submission." Employer Response at 2. The court concurs. As the Fourth Circuit recently noted, it is only after the hearing is concluded that the Director enters the process in the adjudication of § 8(f) issues, *Newport News Shipbuilding v. Pounders*, 326 F.3d 455 (4th Cir. 2003) (". . . the adversarial system breaks down to a degree with regard to § 8(f) claims."), and rarely does such include the submission of rebuttal evidence. Thus, earlier submission of this particular doctor's report would likely have had little effect on the Director's defense of the Special Fund. Further, the document was submitted more than ten (10) days prior to the brief due date, thereby affording the Director the opportunity to address or rebut it. However, in order to protect the integrity of the adversarial system, the court will certainly reopen the record at the Director's request in order to provide him the opportunity to cross-examine Dr. Donlan, or submit rebuttal evidence, should he so desire.

Accordingly, the court concludes that Director's Motion to Exclude the Post-Hearing Evidence is DENIED. The report of Dr. Donlan dated February 17, 2003, is hereby received into evidence and marked as EX 10.

ISSUE

Whether Employer is entitled to relief under Section 8(f), 33 U.S.C. § 908(f), of the Act.

FINDINGS OF FACT

Claimant worked for Employer from June 18, 1951 until September 7, 1951, and from June 14, 1954 until October 18, 1954 as a Junior Draftsman. Claimant and Employer agreed that during this time Claimant was exposed to asbestos, resulting in a diagnosis of asbestosis on or about July 14, 1998. Employer now seeks § 8(f) relief, arguing that Claimant's pre-existing chronic obstructive pulmonary disease ("COPD") materially and substantially contributed to Claimant's overall

respiratory impairment. The Director, however, contends that Employer failed to establish that Claimant's pre-existing disability contributed to his ultimate permanent partial disability.

Medical Evidence[2]

Dr. Charles J. Donlan

Claimant was examined by Dr. Donlan on July 14, 1998 for evaluation of shortness of breath. EX 1 at 2. Dr. Donlan obtained a complete history of Claimant, including his childhood asthma, other past medical conditions, and smoking history. *See* EX 1 at 2-4.[3] A chest x-ray, dated March 9, 1998, revealed cardiomegaly and calcified pleural plaques, likely asbestos related. EX 1at 3. Dr. Donlan's impression of Claimant's condition included "shortness of breath, with exertion, uncertain etiology." *Id.* He ruled out underlying interstitial disease and restrictive disease from pleural abnormalities. *Id.* Dr. Donlan requested a high resolution CT scan of the chest "to better define the pleural abnormalities" and to see if interstitial disease was present.[4] *Id.* He then scheduled Claimant for complete pulmonary function tests, including diffusion capacity, "to better characterize his pulmonary status physiologically."[5] *Id.* at 3-4. Upon reviewing the test results, Dr. Donlan surmised that Claimant had an obstructive impairment and treated him accordingly. EX 1 at 5.

Dr. Donlan proffered his interpretation of Claimant's impairment level in a letter addressed to Claimant's attorney on November 16, 2000. *See* EX 2. Dr. Donlan noted that, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Claimant was classified as Class III, 50% impaired. EX 2. He also opined that an asbestos-related disease was a contributing factor to the impairment. *Id.*

Thereafter, on February 17, 2003 Dr. Donlan responded to Employer's inquiry concerning contribution. *See* EX 10. Upon review of Claimant's records, Dr. Donlan stated that "if [Claimant] had only asbestos-relate pleural disease, his overall impairment would be substantially less." EX 10. Claimant has [COPD], as evidenced by his pulmonary function tests, and the COPD "accounts for the majority of his pulmonary function abnormalities and respiratory impairment." *Id.* Finally, he opined that "if [Claimant] did not have [COPD] and had only asbestos-related pleural disease alone, his impairment would most probably be in the Class II AMA category." *Id.*

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[2]Employer also submitted the medical records of Drs. Heyder and Shaw, however, neither of these opinions offer information relevant to the § 8(f) contribution element issue.

[3]Claimant smoked cigarettes, over two packs per day, for about fourteen years. He quit smoking in 1980.

[4]Dr. Donlan reviewed Claimant's CT scan of the chest, which showed fibrothorax on the left and bilateral pleural plaques. EX 1 at 5. However, there was no evidence of interstitial fibrosis. *Id.*

[5]Claimant's pulmonary function tests showed a total lung capacity of 80% of predicted; moderate obstruction was present with some evidence of air trapping. EX 1 at 5*; see also* EX 8 at 5. He had a forced vital capacity of 2.43 liters, 52% of predicted, FEV_1/FVC 1.54 liters, 42% of predicted, FEV_1/FVC ratio of 63%. *Id.* There was no significant change following brochodilator and diffusion capacity was 75% of predicted. *Id.*

Dr. David Schwartz

On November 29, 2000 Claimant was examined by Dr. Schwartz. *See* EX 6. Dr. Schwartz noted Claimant's history of exposure to asbestos and cigarettes. EX 6 at 1. Upon a physical examination, Dr. Schwartz found Claimant to be "remarkable for a well-appearing male in no acute distress." *Id.* Dr. Schwartz concluded that Claimant progressive shortness of breath was "likely due to exposure to asbestos and/or cigarette smoke." EX 6 at 1. He prescribed full pulmonary function tests, a chest x-ray, and a high-resolution CT scan.[6] *Id.* Upon reviewing the test results, Dr. Schwartz concluded that Claimant had "several diseases processes," including both restrictive (pleural plaques and diffuse pleural thickening) and obstructive (COPD) lung functions. EX 6 at 5.

Dr. Schwartz proffered his interpretation of Claimant's impairment level in a letter addressed to Claimant's attorney on October 30, 2001. *See* EX 7. Dr. Schwartz noted that, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Claimant had Class 3, or moderate, impairment of the whole person due to his lung disease. EX 7. He also opined that an asbestos-related disease, consisting of bilateral pleural fibrosis was a substantial contributing factor to his impairment. *Id.*

Dr. David N. Tornberg

Dr. Tornberg, in his former capacity as Medical Director for Employer, reviewed Claimant's medical records and provided his medical opinions, "stated with a reasonable degree of medical certainty." EX 8 at 3. He noted that Claimant had pre-existing COPD before his asbestosis was diagnosed, and that such condition was permanent and serious, and was manifest to Employer. *Id.* He concluded

> [Claimant's] lung impairment, AMA rating and disability are not caused by his alleged asbestosis alone, but rather his lung impairment, AMA rating, and disability are materially and significantly contributed to and made materially and substantially worse by his pre-existing COPD. A majority of [Claimant's] lung impairment and AMA rating is caused by his COPD. If [Claimant] merely had asbestosis, his AMA [rating] would be at least 35% less. I base this opinion on the 1998 and 2000 pulmonary function tests.

EX 8 at 4.

[6]Claimant's chest x-ray, dated November 29, 2000, evidenced pleural plaques on the left with a few linear opacities bilaterally. EX 6 at 2. In addition, the CT scan, dated November 29, 2000, indicated a few scattered pleural plaques, some of which were calcified, and left pleural thickening. EX 6 at 3. Claimant's pulmonary function tests found Claimant's total lung capacity to be 56% predicted; his FEV-1 to be 11% and his DLCO to be 67% predicted. EX 6 at 5.

CONCLUSIONS OF LAW

Section 8(f) of the Act limits an employer's liability for compensation payments for permanent total disabilities.[7] Liability is limited if a claimant has a pre-existing permanent partial disability, and the disability which exists after the work-related injury is "found not to be due solely" to that injury. *Lawson v. Suwanee Fruit & S.S.Co.*, 336 U.S. 198, 200 (1949). This provision was designed to remove an employer's financial incentive to discriminate between able-bodied and partially disabled workers in its hiring practices. *Director, OWCP v. Newport News Shipbuilding*, 737 F.2d 1295, 1297-8 (4th Cir. 1984). In such cases where employer is entitled to § 8(f) relief, employer's liability is transferred to the Special Fund administered by the U.S. Department of Labor.

An employer who seeks to limit liability for an employee's permanent partial disability under § 8(f) must establish three elements: (1) that the ultimate disability is caused in part by a pre-existing partial disability; (2) that the pre-existing partial disability was manifest to the employer prior to the work-related injury; and (3) that the ultimate disability materially and substantially exceeded the disability that would have resulted from the work-related injury alone, in the absence of the pre-existing condition. *See Director v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d 138-39 (4th Cir. 1998); *see also Director v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175, 182-83 (4th Cir. 1993), *aff'd on other grounds*, 514 U.S.122 (1995).

In this case, the first two conditions necessary for relief under § 8(f) are met. The parties agree that Claimant had a pre-existing disability, i.e. COPD. The second element, manifestation, is not required in cases where the worker suffers from a post-retirement occupational disease, as is the case with Claimant. *See Carmines*, 138 F.3d at 138, n.3; *Newport News Shipbuilding and Dry Dock Co. v. Harris*, 934 F.2d 548, 553 (4th Cir. 1991). The sole issue involves the weight of the evidence with regard to the third requirement, commonly referred to as the "contribution" element. *Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 458 (4th Cir. 2003).

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[7]Section 8(f) provides, in pertinent part:

> In any case in which an employee having an existing permanent partial disability suffers injury, employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. . . .In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, employer shall provide. . .compensation for one hundred and four weeks only. . . .After cessation of the payments for the period of weeks provided herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund. . .

33 U.S. C. § 908(f).

The Fourth Circuit has recently handed down several decisions concerning § 8(f) relief, particularly the contribution requirement. *See, e.g., Pounders*, 326 F.3d 455; *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434 (4th Cir. 2003). These cases explain and apply the court's previous decisions in *Harcum*[8] and *Carmines*,[9] emphasizing that the employer must provide evidence of the impact of the asbestosis standing alone, absent any pre-existing lung condition, in order to satisfy the *Carmines* test. *Pounders*, 326 F.3d at 459-60.

Upon review of the evidence, the court finds that Employer has failed to prove that Claimant's current impairment is materially and substantially greater than the disability resulting from the work-related condition alone. Employer provided the medical reports and opinions of several doctors; however, none of these medical opinions provide an adequate assessment of the impact of the asbestosis standing alone.[10]

There were three doctors who provided opinions applicable to the contribution element analysis. First, Dr. Schwartz stated that Claimant had Class 3, or moderate, impairment of the whole person due to his lung disease. He, however, stated only that the asbestos-related disease was a "substantial contributing factor to his impairment." This opinion lacks the quantification element, as required by the Fourth Circuit. Dr. Schwartz failed to provide an opinion as to the extent of the disability Claimant would have suffered without the COPD. Therefore, it is insufficient to support an award of § 8(f) relief.

Next, Dr. Donlan provided an opinion concerning the contribution element. He stated if Claimant did not have COPD, and had only asbestos-related disease, his impairment would most probably be in the Class 2 AMA category (10%-25% impaired), as opposed to his current impairment level of Class 3 AMA category (50% impaired), which includes both the asbestos and pre-existing obstructive conditions. This statement sufficiently quantifies the portion of Claimant's disability that was due to his asbestos-related impairment alone; it does not employ the discredited "subtraction" method or vague and ambiguous characterizations. It established the level of disability in the absence

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[8]The employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceed[ed] the disability as it would have resulted from the work-related injury alone. A showing of this kind requires quantification of the level of impairment that would [have] ensue[d] from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the [employee] would [have] suffer[ed] if not previously disabled when injured by the same work-related injury. *Harcum*, 8 F.3d at 185.

[9]An employer must quantify the type and extent of the disability that the claimant would have suffered without the pre-existing condition. . . . It is not enough . . . to simply calculate the total current disability and subtract from it the disability resulting from the pre-existing condition. *Carmines*, 138 F.3d at 139.

[10]This court recognizes, as did the Fourth Circuit in *Pounders*, that there is an inherent difficulty in the abilities of a doctor to make such an assessment in a case involving successive lung diseases. However, this difficulty did not compel the Fourth Circuit to adopt a different rule. *Pounders*, 326 F.3d at 460, n. 2. Therefore, this court is not at liberty to announce or apply the rule differently in this case.

of the pre-existing permanent partial disability (COPD), and thus provided the court with a basis upon which to determine whether the ultimate permanent partial disability is materially and substantially greater. *See Carmines*, 138 F.3d at 185).[11]

The conclusion, however, lacks sufficient credibility, as it fails to provide the court with an opportunity to "examine the logic" and "evaluate the evidence" upon which the opinion was based. As stated in *Carmines*, when evaluating the evidence relevant to an application for § 8(f) relief, the ALJ "may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluation the evidence upon which their conclusions are based." *Carmines*, 138 F.3d at 140.

Dr. Donlan's statement is conclusory, and not supported by medical evidence or reasoning; it does not identify specific records or tests upon which the opinion is founded. It is generalized and lacks evidentiary support. In fact, this conclusion, proffered by Dr. Donlan on Febraury 17, 2003, many years after the record indicates he last examined Claimant, appears to be inconsistent with his earlier conclusion, dated November 16, 2000, in which he opined only that asbestos-related disease was a contributing factor in Claimant's impairment. The record provides the court with no medical explanation or test results which would support Dr. Donlan's sudden ability to quantify Claimant's asbestos-related impairment absent the pre-existing COPD condition.

The opinion is thus "far different from the 'objective quantification' and clear descriptions that were present in *Harcum II*, 131 F.3d at 182." *Ward*, 326 F.3d at 442. The bottom line is, Dr. Donlan "does not refer to any evidence justifying [his] conclusion, nor does he explain how he arrived at it." *Id.* (quoting ALJ Decision). Thus, the court is unable to make an appropriate determination under the controlling standards, as announced by the Fourth Circuit in cases such as *Harcum*, *Carmines*, *Pounders*, and *Winn*, *supra*, and the opinion is insufficient to establish the contribution element.

Finally, Employer offered the opinion of Dr. Tornberg in an attempt to satisfy the contribution requirement. Dr. Tornberg concluded, upon a review of Claimant's medical records, that if Claimant had asbestosis only, his AMA rating would be at least 35% less. This is the same language, and use of the discredited "subtraction" method, that was recently rejected by the Fourth Circuit in *Pounders*,

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[11]The Fourth Circuit, in *Carmines*, explained that

> to meet its burden, the employer should have offered evidence from a doctor, such as a treating physician, who could testify to the extent and seriousness of the asbestosis suffered by the Claimant and the degree of disability it would have caused alone. Such evidence is necessary before the ALJ can compare the degree of disability that would have resulted solely from the asbestosis to the degree of disability and the supposed pre-existing conditions.

Carmines, 138 F.3d at 143-44.

326 F.3d at 459-60, and *Winn*, 326 F.3d at 431.[12] Thus, Dr. Tornberg's opinion is insufficient to support a grant of relief under § 8(f).

Accordingly, based upon the evidence on the record, Employer has failed to properly quantify the extent of Claimant's work-related impairment. The court is therefore unable to evaluate whether Claimant's ultimate disability materially and substantially exceeded the disability that would have resulted from the work-related asbestos condition alone, in the absence of the pre-existing COPD. The contribution element has not been established and Employer is not entitled to § 8(f) relief.

ORDER

It is hereby ORDERED as follows:

1. Employer shall pay to Claimant permanent partial disability compensation at the rate of $147.65 per week from July 24, 1998, to the present and continuing for his 53% impairment due to asbestos related lung disease.

2. Employer shall compensate Claimant for all past, present, and future medical bills incurred for treatment, testing, and surveillance of his asbestos related lung disease, pursuant to § 7 of the Act.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS. 267 (1984).

4. All computations are subject to verification by the District Director.

5. Employer's request for § 8(f) relief is DENIED.

[12]Because the language employed by Dr. Tornberg is insufficient on its face to support the contribution element, the court declines to address the applicability of the Fourth Circuit's admonishment of company physicians in *Ward*, 326 F.3d at 440, n.3. Suffice it to say that while it is true that a physician's statement is not conclusive of the ultimate fact in issue, it is equally true that the opinion of a board certified, licensed physician should not be disregarded as a matter of law because of who their employer happens to be.

6. Employer is to pay Claimant's counsel, Jennifer West Vincent, $1,602.00 for legal services rendered and costs incurred in the adjudication of this case, in addition to, and independent of, any compensation payments to be made to Claimant.

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Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/LLT